No. 75-1503

In the Supreme Court of the United States

OCTOBER TERM, 1975

TEXACO, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 52a-75a) is not yet reported. The opinion of the district court (Pet. App. 15a-45a) is reported at 398 F. Supp. 865.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (Pet. App. 76a) was entered on February 9, 1976, and a timely petition for rehearing (Pet. App. 77a) was denied on March 18, 1976. The petition for a writ of certiorari was filed on April 16,

1976. The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. (Supp. IV) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 12 U.S.C. (Supp. IV) 1904 note, and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were afforded adequate notice of the subjects and issues involved in a rulemaking proceeding conducted by the Federal Energy Administration.

2. Whether the regulation issued at the conclusion of that rulemaking was effective immediately or 30 days after its publication in the Federal Register.

3. Whether the Federal Energy Administration acted arbitrarily and capriciously in adopting the regulation.

STATUTES AND REGULATIONS INVOLVED

With the exceptions noted below, the relevant statutes are set forth at Pet. 3–4.

Section 3 of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 15 U.S.C. (Supp. IV) 752, provides:

> For purposes of this chapter:
>
> * * * * *
>
> (7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Section 4 of that Act, 15 U.S.C. (Supp. IV) 753, provides:

> (a) [T]he president shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. * * *
>
> (b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—
>
> * * * * *
>
> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers and branded independent marketers;
>
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;
>
> * * * * *

between "refiners" and "resellers" in order to control the maximum price those firms might charge for their products and provide a dollar-for-dollar pass through of their increased raw materials cost.[1]

"Refiners" are required to pool their costs of acquiring crude oil and other costs of production and spread them over the production of all their domestic refineries in determining their allowable ceiling price for any petroleum product. 10 C.F.R. Part 212, Subpart E. "Resellers" are allowed to pass through directly to their customers any increases in petroleum costs. *Id.*, at Subpart F. Prior to the promulgation of the regulation petitioners challenge, the term "reseller" included in Puerto Rico, as elsewhere, any entity of a refiner engaged in the business of purchasing and reselling petroleum products which purchased less than 5 percent of such products from its parent refiner and which "historically and consistently exercised the exclusive price authority with respect to sales by the entity." 10 C.F.R. 212.91.

There are two main refiners of crude oil in Puerto Rico—Caribbean Gulf Refining Corporation, a subsidiary of a domestic refiner, the Gulf Oil Corporation, and Commonwealth Oil Refining Company

[1] The rules originally were adopted by the Federal Energy Office ("F.E.O."). to which the President had delegated his authority under the Allocation Act. Executive Order No. 11748. 38 Fed. Reg. 33575. F.E.O. became the Federal Energy Administration ("F.E.A.") pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 97, 15 U.S.C. (Supp. IV) 761 *et seq.*

("CORCO"), which operates its only refinery in Puerto Rico and has no external distribution system (Pet. App. 19a, 55a). Under the refiner regulation, Caribbean Gulf, which sells approximately 25 percent of Puerto Rico's refined petroleum products, was required to average its petroleum costs with the product costs of its parent. However, CORCO, which sells approximately 75 percent of the island's refined petroleum, was permitted to pass through its increased raw materials costs directly to Puerto Rican wholesalers (Pet. App. 55a). Since price controls had held the price of domestic crude oil to approximately $5.50 per barrel, while the uncontrolled world oil price had increased to $14 per barrel, Caribbean Gulf was required to sell its refined products at a considerably lower price than CORCO (Pet. App. 20a, 57a–58a).

Certain wholly-owned subsidiaries of domestic refiners, including petitioners Texaco Puerto Rico, Inc., Mobil Oil Caribe, Inc., and Esso Standard Oil S.A. Ltd., marketed petroleum products in Puerto Rico. These subsidiaries purchased virtually all their petroleum products from CORCO and historically and consistently had exercised exclusive pricing authority. Therefore, since these firms qualified as "resellers" under the F.E.A. regulation, prior to March 20, 1974, they were permitted to pass through directly to their customers any increases in petroleum prices charged by CORCO (Pet. App. 19a–20a, 55a–56a).

Another major Puerto Rican marketer, the Shell Company (Puerto Rico) Ltd., also purchased refined

petroleum from CORCO and was subject to the "reseller" rule. Unlike the other major marketers, Shell (P.R.) has no domestic parent refiner but is 99.9 percent owned by The Shell Petroleum Company Limited, a United Kingdom company (Pet. App. 20a, 56a). Although that company and The Shell Oil Company, a Delaware corporation, are under the common control of two parent companies, Shell (U.S.) has no interest in Shell (P.R.) (Pet. App. 20a, 32a–35a, 56a).

Thus, under the original F.E.A. regulation of January 15, 1974, both CORCO and these four major marketers, which together controlled between 73 and 78 percent of the Puerto Rican retail petroleum market (Pet. App. 20a), were authorized to pass through any increase in product costs to the consumer.

2. Because of its total dependence upon high-priced foreign oil, Puerto Rico faced a substantially greater increase in petroleum costs than the mainland United States. On February 1, 1974, CORCO increased the price of refined gasoline sold to all its customers, including the petitioner marketing subsidiaries and Shell (P.R.), by approximately 17 cents per gallon (Pet. App. 57a). F.E.A. regulations prevented Caribbean Gulf from posting a comparable price increase. Therefore, to the extent that CORCO's customers attempted to pass through these increased costs, a two-tiered pricing structure emerged. Widespread disruption of the island's economy ensued, including a two-day shutdown of retail gasoline stations and a major transportation strike (Pet. App. 21a, 57a).

On March 20, 1974, F.E.A. announced an interim amendment to its mandatory petroleum price regulations by which Puerto Rican subsidiaries of domestic refiners would be subject to the refiner rule, rather than the reseller rule, until it was determined whether such treatment was appropriate on a permanent basis. 39 Fed. Reg. 10434. F.E.A. determined that there was good cause to make the amendment effective immediately (*ibid.*).

At the same time, it published a notice of proposed rulemaking and public hearing to determine whether Puerto Rican marketers "owned or controlled by refiners should be subject to the price regulations applicable to refiners, * * * resellers, or to some other form of price regulation." 39 Fed. Reg. 10454. Concurrently, F.E.A. issued a separate order to Shell (P.R.) requiring it to adhere to its February 22, 1974, price levels pending the conclusion of the rulemaking proceedings (Pet. App. 22a, 58a).

Representatives of all the petitioner marketing subsidiaries attended the public hearings (Pet. App. 68a–69a & n. 18). The special problem of Shell (P.R.) was fully explored at the hearings, and a proposal similar to that ultimately adopted was discussed (Pet. App. 68a, 71a). Representatives of the subsidiaries were afforded full opportunity to comment on the problem and were questioned on this subject by the presiding F.E.A. official (Pet. App. 68a–71a).

On May 20, 1974, F.E.A. published its final mandatory petroleum price regulation for Puerto Rico (issued May 16, 1974), which provided that all entities of mainland United States refiners that operated on the island would be treated permanently as "refiners." 39 Fed. Reg. 17764. It stated (*id.* at 17765):

> [F.E.A.] has concluded that the refiner price rule should be applied in Puerto Rico. The foremost consideration in this regard is the adverse impact that the reseller rule would have on the economy of Puerto Rico. * * * [T]he need to maintain "equitable" prices for petroleum products in Puerto Rico is particularly acute in view of the nature of the Puerto Rican economy.

F.E.A. found that Shell (P.R.) was not owned directly or indirectly by a domestic refiner and therefore must be treated as a "reseller" under the price regulations, which would permit it to pass through its increased product costs. 39 Fed. Reg. 17765. However, F.E.A. recognized that while treating Shell (P.R.) as a reseller and the other subsidiaries as refiners might make the price of petroleum on the mainland and on the island more comparable, that adjustment alone would not eliminate the potential for disruption of the Puerto Rican economy. If one major marketer had posted substantially higher product prices than the other firms, the two-tier pricing structure, with its attendant risks of chaos and economic dislocation, would have been recreated.

Therefore, F.E.A. established a mechanism to equalize the retail prices charged by the various marketers,

while still allowing CORCO and Shell (P.R.) to pass through their increased costs (39 Fed. Reg. 17765):

> [F.E.A.] has determined that it is necessary to require CORCO to adjust its prices to Shell (Puerto Rico) downward, and to permit CORCO to make an upward adjustment in the prices it charges to its other customers, so that [CORCO] will continue to obtain a dollar-for-dollar pass through of its increased product cost.

Thus, the petroleum costs of other CORCO customers were adjusted upward to compensate the refiner for price concessions necessary to bring Shell (P.R.)'s maximum allowable prices into line with that of its competitors. Under the "refiner" regulation, the marketing subsidiaries and their domestic parents could factor these increased costs into their composite system crude oil costs and pass this increment through to their customers on the mainland and in Puerto Rico.

With the renewed availability of adequate petroleum supplies after the lifting of the oil embargo, F.E.A. subsequently determined that removal of the Shell (P.R.) price adjustment would not produce as great an adverse effect on the Puerto Rican economy as it would have in May 1974. Therefore, after receiving assurances from Shell (P.R.) that it would not attempt to pass through all its increased costs, effective October 1, 1974, F.E.A. amended its regulations to eliminate the requirement that CORCO adjust its prices in this fashion. 39 Fed. Reg. 36320–36322.

3. Petitioners Esso Standard Oil S.A., Mobil Caribe, and Texaco Puerto Rico, and their respective domestic parents, instituted separate actions for declaratory and injunctive relief in the United States District Court for the District of Columbia attacking, on procedural and substantive grounds, the May 20, 1974, regulation insofar as it required them to compensate CORCO for its price reduction to Shell (P.R.).[2] The district court considered the cases together and granted summary judgment for the defendants and money judgments for CORCO on its counterclaims and those brought on its behalf by the United States.

The court held that petitioners had had "actual notice of the subjects and issues involved" in the rulemaking proceeding (Pet. App. 43a) and that, while the May 20, 1974 regulation did not contain an explicit finding of good cause to make it effective immediately, the need for immediate effectiveness was "obvious" from the findings in the regulation itself, which by its terms "required immediate effectiveness" (Pet. App. 44a). It also found that a rational basis existed for the Shell (P.R.) pricing provision in the regulation and that its adoption was "within the broad regulatory authority conferred upon the agency" (Pet. App. 40a).

[2] CORCO was allowed to intervene in each suit. The United States also was allowed to intervene for the sole purpose of asserting a counterclaim that the oil companies be ordered to pay the sums due CORCO. The Commonwealth of Puerto Rico intervened only in the suit commenced by Mobil Caribe (Pet. App. 26a).

The Temporary Emergency Court of Appeals affirmed (Pet. App. 52a–75a). It found that petitioners had "received fair and reasonable advance notice of the subjects and issues finally covered by the regulation" and "were afforded fair and reasonable opportunity for comment and the submission of data in substantial compliance" with the requirements of the Administrative Procedure Act ("APA") (Pet. App. 73a). It affirmed the district court's findings that "there was obviously good cause for the regulation to be made effective immediately," and that "by clear implication * * * that was its intent" (Pet. App. 73a–74a). Finally, it held that F.E.A.'s solution to the Shell (P.R.) problem was "a rational response * * * which took into consideration the statutory responsibilities of the agency" and was not arbitrary or capricious (Pet. App. 64a–65a).

ARGUMENT

Petitioners challenge, on procedural and substantive grounds, a short-lived F.E.A. regulation, no longer in effect, addressed to a nonrecurrent problem affecting a minute segment of the petroleum industry. Petitioners do not challenge the constitutionality of the regulation or the statutory authority of the agency to promulgate it, but simply contend that the regulation was procedurally infirm and arbitrary and capricious. The petition presents no issues of either general or prospective significance. Furthermore, applying well established principles, the Temporary Emergency

views and to permit the agency to obtain those views and thereby to make the agency procedures flexible and responsive to the needs to be met. Petitioners' argument that the notice must specify the precise details of the regulations ultimately adopted would defeat those objectives.

The notice of rulemaking stated in part (39 Fed. Reg. 10454):

> Notice is hereby given that [F.E.A.] will receive written comments and hold a public hearing in San Juan, Puerto Rico, with respect to whether certain entities operating in Puerto Rico which are owned or controlled by refiners should be subject to the price regulations applicable to refiners, to the price regulations applicable to resellers, or to some other form of price regulation.

The notice expressly stated that the major concern of the proceeding would be the potential effects upon the Puerto Rican economy if purchasers from CORCO were treated as resellers and the retail prices of their products allowed to reflect the high price of foreign crule oil (*id.* at 10454–10455). It also directed interested parties to address, *inter alia*, "the place in the overall corporate structure of the refiner which is occupied by the Puerto Rican entity" and "the effects of any proposed rule on prices in Puerto Rico, * * * on the overall market structure in Puerto Rico, [and] on the entities operating in Puerto Rico" (*id.* at 10455).

Court of Appeals correctly concluded that F.E.A. followed proper procedures in adopting this rule and that the regulation was not arbitrary or capricious. Further review is not warranted.

1. Petitioners contend (Pet. 11) that the notice of rulemaking and public hearings published on March 20, 1974, did not afford adequate notice that Shell (P.R.) would be exempted from the "refiner" rule or that the price differential on CORCO's sales to Shell would be established.

Section 5(b) of the APA, 60 Stat. 239, as amended, 5 U.S.C. 553(b), provides that general notice of proposed rulemaking shall be published in the Federal Register and shall include "either the terms or substance of the proposed rule or a description of the subjects and isues involved." But that provision does not require advance publication of each precise proposal the agency ultimately may adopt as a regulation, and obviously does not bar an agency from changing its proposal as the result of the factual submissions and comments it receives. See *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43, 48 (C.A. 9), certiorari denied, 389 U.S. 844. As the Temporary Emergency Court noted (Pet. App. 67a), the degree of specificity petitioners suggest was mandatory is not required and could not have been provided at the time notice was given.

The purpose of rulemaking is to give affected persons the opportunity to inform the agency of their

As the court below properly concluded (Pet. App. 66a–67a), under any reasonable interpretation of the notice, the contemporaneous price-freeze order F.E.A. issued to Shell (P.R.), and the circumstances surrounding the initiation of this proceeding, petitioners received fair and adequate notice that among the subjects and issues to be considered in the rulemaking would be the appropriate form of price control for the operations of Shell (P.R.). The precise pricing regulation ultimately adopted reflected and implemented the original description of the goals of the rulemaking and were foreshadowed by the proposals, questions and comments received during the proceeding. See *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F. 2d 646, 658 (C.A. 1).

Since the published notice was adequate, there is no occasion to consider the alternative holding of the Temporary Emergency Court that any arguable deficiency in the notice was cured by petitioners' receiving actual notice [3] of a proposed version of the regula-

[3] Although not named in the published notice of rulemaking, petitioners received fair notice of F.E.A.'s proposed treatment of Shell (P.R.) during the proceedings, were questioned about it at the hearings, and were afforded an adequate opportunity to submit written comments on that proposal (Pet. App. 67a, 73a). See *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 241, 243–244.

Rodway v. *United States Department of Agriculture*, 514 F. 2d 809 (C.A. D.C.), on which petitioners rely (Pet. 14), established that "[a]bsent actual notice, the public should be held accountable only for notice plainly set forth" in the Federal Register. 514 F. 2d at 815. But in this case, since the published notice was adequate and the affected firms had actual notice of F.E.A.'s proposal, that decision is irrelevant.

tion F.E.A. finally adopted (Pet. App. 68a–73a).[4] Moreover, the procedures F.E.A. followed were in substantial compliance with the APA, and any technical variations, which did not prejudice petitioners, afford no ground for relief. See *California* v. *Simon,* 504 F. 2d 430, 440 (T.E.C.A.), certiorari denied, 419 U.S. 1021; *Nader* v. *Sawhill,* 514 F. 2d 1064 (T.E.C.A.).[5]

2. Petitioners contend (Pet. 16) that the May 20, 1974 regulation did not become effective until at least 30 days after its publication in the Federal Register. But the question whether this particular regulation became effective immediately upon publication in the Federal Register or not until 30 days thereafter is not an issue requiring resolution by this Court.

[4] The petitioner parent refiners apparently challenge (Pet. 15) the holding of the court below that they had actual notice of the subjects and issues of the rulemaking (Pet. App. 68a–69a). However, this inherently factual issue does not warrant review by this Court. Moreover, the question whether the subsidiaries "represented" their parents at the public hearings is irrelevant, for the persons actually affected by the rulemaking—the marketing subsidiaries—do not challenge (Pet. 14) the lower courts, finding that they received actual notice. The parent refiners were brought into this litigation only by F.E.A.'s issuance of remedial orders against them for nonpayment of the CORCO invoices, which, under F.E.A. regulations, can be brought against both the parent and the subsidiary, although only the subsidiary dealt directly with CORCO (Pet. App. 25a n. 1).

[5] In any event, the Temporary Emergency Court of Appeals is a court of limited jurisdiction. Contrary to petitioners' assertion (Pet. 10–11), its resolution of these procedural questions is unlikely to have great impact on the other courts of appeals.

If, as petitioners suggest (Pet. 10), federal agencies are abusing the notice and comment provisions of Section 4 of the APA, the courts of appeals which review those actions are the appropriate forums to correct that condition.

Section 5(d) of the APA, 5 U.S.C. 553(d), provides that the required publication of a substantive regulation shall be made not less than 30 days before its effective date, except "as otherwise provided by the agency for good cause found and published with the rule." Both lower courts correctly found that the findings published with the instant regulation demonstrated good cause for its immediate effectiveness and that, although not expressly so stating, its terms obviously required immediate effectiveness (Pet. App. 44a, 73a–74a).

The March 20, 1974 "reseller" regulation had been made effective immediately in view of the existing disruption of the island's economy. The concurrent notice of rulemaking expressly informed all interested parties that the proceeding would be given "expedited treatment" (39 Fed. Reg. 10455). The discussion at the public hearings and the findings in the May 20, 1974 regulation demonstrated the "continuing urgency" of preserving the existing pricing structure and the need for making its permanent extension effective immediately (Pet. App. 74a). Moreover, from the text of the regulation, the base pricing formulas it established, and the circumstances surrounding its adoption, it is evident that the regulation was intended to be effective immediately (*ibid.*).

Therefore, the courts below correctly held that there was substantial compliance with Section 553; the violation, if any, was the technical one of not stating explicitly that which was implicit. See *Nader* v. *Saw-*

hill, supra, 514 F. 2d at 1068–1069; *De Rieux* v. *The Five Smiths, Inc.*, 499 F. 2d 1321 (T.E.C.A.), certiorari denied, 419 U.S. 896; *California* v. *Simon, supra*.

3. Petitioners further contend (Pet. 18) that the Temporary Emergency Court of Appeals erroneously afforded "extreme deference" to the regulation and subjected it to "a different and less exacting standard" of review than that normally governing administrative regulations in concluding that it was not arbitrary or capricious. To the contrary, the court carefully exercised its reviewing function in concluding that F.E.A.'s action was a "rational response" to the pricing problem to which, under well-settled principles, the courts will defer (Pet. App. 64a). See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285–286; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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